

MAR 02 2012

Part of
Public Record

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

REASONABLENESS OF BNSF)	
RAILWAY COMPANY COAL)	
DUST MITIGATION TARIFF)	Docket No. FD 35557
PROVISIONS)	

**JOINT PETITION OF AMEREN ENERGY FUELS & SERVICES COMPANY;
ARIZONA ELECTRIC POWER COOPERATIVE, INC.; AUSTIN ENERGY;
CLECO CORPORATION; CPS ENERGY; ENTERGY SERVICES, INC.;
KANSAS CITY POWER & LIGHT COMPANY; LOWER COLORADO RIVER
AUTHORITY; MIDAMERICAN ENERGY COMPANY; MINNESOTA POWER;
NEBRASKA PUBLIC POWER DISTRICT; OMAHA PUBLIC POWER
DISTRICT; TEXAS MUNICIPAL POWER AGENCY; WESTERN FARMERS
ELECTRIC COOPERATIVE; WESTERN FUELS ASSOCIATION, INC.; AND
WISCONSIN PUBLIC SERVICE CORPORATION TO POSTPONE THE
MARCH 13, 2012 TECHNICAL CONFERENCE**

The above-named organizations (collectively "Member Organizations") of the Western Coal Traffic League ("WCTL") respectively request that the Surface Transportation Board ("STB" or "Board") postpone the technical conference currently scheduled for March 13, 2012 pending the Board's disposition of their appeal of the Director, Office of Proceedings' decision served on February 27, 2012 ("Director's Decision" or "Decision").¹ In support hereof Member Organizations state as follows:

1. BNSF Railway Company ("BNSF") has asked the Board to issue 16 subpoenas duces tecum – one for each WCTL Member Organization – containing a total of 144 separately numbered requests for production. WCTL Member Organizations

¹ This Petition is being filed under 49 C.F.R. § 1117.1 (petitions for relief not otherwise covered). The Board's authority over procedural matters extends to granting requests for "postponement of . . . procedural dates." 49 C.F.R. § 1011.6(c)(1).

oppose the issuance of these subpoenas, *inter alia*, on grounds that the issuance of the subpoenas will have a chilling effect on future participation by trade associations in proceedings before the Board.

2. The Director's Decision holds that WCTL Member Organizations "are subject to discovery in this proceeding," (*id.* at 1) but does not "address[] the merits of any individual discovery request at this time." *Id.* at 4. Instead, the Decision provides WCTL Member Organizations the "opportunity" to engage in "negotiat[ions]" with BNSF concerning BNSF's requested non-party discovery, to be followed by a "technical conference" on March 13, 2012 (*id.* at 4) and, "[f]ollowing the technical conference, the Board will issue subpocnas for discovery from Member Organizations as appropriate." *Id.* at 5.

3. On March 1, 2012, WCTL Member Organizations filed an appeal of the Director's ruling that the Member Organizations are subject to non-party discovery. This appeal was filed pursuant to 49 C.F.R. § 1115.9, which establishes expedited interlocutory appeal procedures. Under these procedures, BNSF's reply to this appeal is due within three business days (by March 6th) and in cases involving party discovery (as opposed to the non-party discovery at issue here), the Board attempts to decide § 1115.9 appeals within 20 days after the final reply is filed, which if this case involved a party-based discovery dispute, would be March 26th. *See* 49 C.F.R. § 1114.31(a)(4).

4. As matters now stand, each of the 16 individual WCTL Member Organizations will have to spend substantial amounts of time and money to work with their inside and outside counsel to start the process of "negotiating" with BNSF counsel,

preparing for the technical conference, and participating in that conference. All of these substantial expenditures will prove to be unnecessary if the Board grants the relief requested in WCTL Member Organizations' pending appeal.

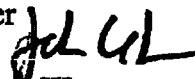
5. To avoid this very costly and, if WCTL Member Organization's appeal is granted, very wasteful, result, the Board should postpone the date for the technical conference pending disposition of WCTL Member Organizations' appeal. If that appeal is denied, the Board can reschedule the technical conference, and each Member Organization could then engage in the pre-conference negotiations contemplated by the Decision.

6. Granting the requested postponement will not harm any party to this proceeding, nor should it result in any material case delays. The Director has already stayed the procedural schedule pending resolution of the non-party subpoena issues; WCTL filed its appeal under the fast-track § 1115.9 procedures; and, as noted above, the Board's policy is to decide § 1115.9 appeals expeditiously.

7. Granting the requested postponement will also avoid putting WCTL Member Organizations in an untenable position. The Director's Decision states that the Board will issue subpoenas after the March 13 conference, as appropriate. If, as is likely, the Board has not decided WCTL Member Organizations' appeal at that time, WCTL Members may be directed to comply with subpoenas despite their pending challenge to the legality of those subpoenas. This unfair, and unnecessary, result will also be remedied simply by postponing the date of the technical conference pending the Board's resolution of WCTL Member Organization's appeal.

**WHEREFORE, for the reasons set forth above, WCTL Member
Organizations respectfully request that their Joint Petition be granted.**

Respectfully submitted,

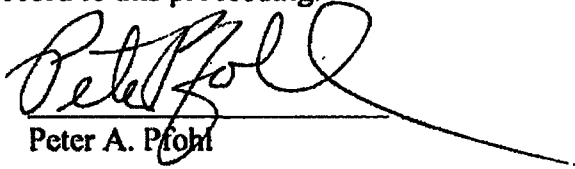
William L. Slover
John H. LeSeur 
Andrew B. Kolesar III
Peter A. Pfohl
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: March 2, 2012

Attorneys for Member Organizations

CERTIFICATE OF SERVICE

I hereby certify that this 2nd day of March, 2012, I have caused copies of the forgoing Joint Petition to be served via first-class mail, postage prepaid, or by more expeditious means, upon all parties of record to this proceeding.


Peter A. Pfohl